IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,
v.
EL PASO NATURAL GAS COMPANY, et al.,
Appellees.

On Appeal from the United States District Court for the District of Utah

PETITION OF COLORADO INTERSTATE CORPORATION FOR RECONSIDERATION AND MOTION FOR HEARING ON THE MERITS

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July 11, 1969

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PETITION OF COLORADO INTERSTATE CORPORATION FOR RECONSIDERATION AND MOTION FOR HEARING ON THE MERITS

Colorado Interstate Corporation ("CIG") prays that the Supreme Court recall its opinion and order of June 16, 1969 vacating the divestiture decree of the District Court, and that it afford the 33 parties which unanimously supported that judgment a hearing on the merits.

The welfare of millions of gas consumers is affected by this case. The regulatory agencies of ten States participated in the proceedings below. Yet this Court's summary reversal has followed, not a hearing on the merits, but solely a hearing confined by its own order to a procedural question. (22 L. Ed. 2d 751)

The Court has acted on the basis of a fatally defective record—one which omits 155 pages of "Implementing Documents" containing the very provisions which accomplish the divestiture this Court previously ordered* and now finds incomplete. In the absence of a hearing, and with a record barren of these critical elements, the Court has misunderstood the nature and purpose of the District Court's decree—a misunderstanding apparent from the majority opinion and demonstrable from the missing portions of the record.

The decision of the majority is, as a result, erroneous in two basic respects:

First, the decision below will immediately sever the divested properties from any influence or control by defendant El Paso Natural Gas Company ("El Paso"). It will prevent El Paso from ever again acquiring a voting interest in New Company or in CIG, or any influence or control over either. The form of the consideration to be paid El Paso is no more than a financing convenience; within a period of time shorter than that approved by the Court in other divestiture cases, El Paso will cease to have any interest at all in the New Company. The decision *did* accomplish a "complete divestiture" of the Northwest pipeline system, and it *did* establish New Company as an effective independent competitor, well equipped to challenge El Paso for the California market.

Second, under the mistaken impression that the District Court had failed to accomplish what this Court's prior mandates had directed, the majority opinion sets out new, specific guidelines for future action below. It requires a strictly cash sale of the Northwest pipeline system and a

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* See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

reallocation of El Paso's gas reserves. Both are potentially disastrous.

A cash sale will deprive any purchaser of the advantages, otherwise available to New Company, of a sound financial structure, with interest rates on debt and a cost of equity comparable to those historically available to El Paso and other established pipeline systems. New Company's additional interest costs alone will amount to $5,000,000 annually —and this burden will ultimately be borne by gas consumers.

The reallocation of gas reserves threatens to deprive California of the very fruits of the competition this case was designed to restore. It promotes neither lower gas costs nor new supply sources to meet California's mounting needs. It promises merely to re-route gas already dedicated to California service—and at an inevitably higher cost.

If it is possible to follow these guidelines at all, they will have harsh and obviously unintended consequences for gas consumers in both California and the Pacific Northwest. At best, they will needlessly drive up the price of natural gas. They may so severely handicap any purchaser of the Northwest system that it will be unable to compete effectively in California.

Thus the errors of the June 16 decision will have a serious, adverse, dollars-and-cents impact on the consuming public. They will impair, as well, the national interest in a sound and competitive natural gas industry.

POINT I

The Court has acted without giving the parties a hearing on the merits.

The majority states that "the parties concerned were afforded an opportunity to be heard on the question whether there had been compliance with the mandate." (Slip opin-

ion p. 1) They were not. The majority has overlooked the realities of the situation that obtained when counsel were before the Court on April 29, 1969.

The Utah Public Service Commission ("Utah") had brought Judge Chilson's decision to this Court in late November, 1968 by filing a Jurisdictional Statement. CIG (and at least ten other parties) had prepared to answer that Jurisdictional Statement with motions to affirm. Shortly before such motions were due to be filed, however, Utah itself moved under Rule 60 to dismiss its appeal. The office of the Clerk then informed counsel for CIG (and, we understand, counsel for other parties) that the filing of motions to affirm would be inappropriate.

On April 21, 1969, this Court took the unusual step of scheduling an argument on April 29 with respect to Utah's Rule 60 motion to dismiss and another motion "for a hearing" which William M. Bennett, Esq. apparently had filed some time before. (This latter motion had not been and has never been served on CIG or, so far as we can tell, on most of the other parties.) The nature and scope of the only hearing held by this Court in this case are defined by its own unambiguous order which reads:

> "The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires." (22 L. Ed. 2d 751)

There was no reason to suppose from this order that the argument of April 29th was intended as a plenary hearing. The *only* unfavorable result that any party could possibly have anticipated was that this Court might, despite its own rules, decide to note probable jurisdiction and to set down the appeal for briefing and argument in the normal course. It was for that reason that those parties who appeared—

and many did not—addressed themselves only to the procedural issues framed by the Court's order.*

When the Court went to the merits in these circumstances, it failed to apply to itself the standards of appellate procedure which it has required of lower courts. In *Garrison* v. *Paterson*, 391 U.S. 464 (1968), this Court reversed the Court of Appeals for the Tenth Circuit, holding

> "that where an appeal possesses sufficient merit to warrant a certificate [of probable cause], the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited.[2]" (391 U.S. at 466)**

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* The Court should not overlook the atmosphere in which the argument took place. Mr. Bennett's motion, and an earlier *ex parte* "report" which he had filed with the Court on or about March 24, consisted, in large part, of *ad hominem* attacks on the professional and personal integrity of the Solicitor General, of ranking officials of the States of Utah and California, and of other parties to the case. The dispatches of a syndicated newspaper columnist had given wide currency to these baseless charges and, indeed, had expanded upon them to implicate the President and the Attorney General of the United States.

The officials and other parties thus assaulted were under an obvious practical necessity to address themselves publicly to these contentions, however groundless, and only incidentally to the merits. See, *e.g.*, the oral presentation of the Solicitor General, which was essentially a discussion, not of the case, but of the intramural procedures of the Department of Justice.

** The included footnote is the Court's. It reads as follows:

> "2. In an effort to determine whether the merits had been addressed, and whether petitioner was on notice that they should be addressed in full, at the unrecorded hearing [of the court of appeals] on June 9, this Court solicited further submissions from the parties in this case. Petitioner replied that the merits had been raised only to the extent necessary to show grounds for a certificate of probable cause. Respondent replied that petitioner was given all the time he wanted. *Respondent was unable, however, to point to any rule or decision forewarning an applicant for a certificate of probable cause to make his argument on the underlying issues in full.*" (Emphasis supplied.)

The right of an appellant to notice and an opportunity to address the merits once he has surmounted the initial hurdle of establishing that he has an argument worth considering is, surely, equally the right of thirty-two appellees (and one unwilling appellant), the probable merit of whose cause has been judicially certified by the very decision appealed from.

It is not a procedural formalism that is involved in giving a hearing to the parties who made the record below and are familiar with the facts. The fundamental reason why the right to a hearing is normally accorded constitutional protection is that its denial in *any* case is likely to result in a misunderstanding by the court of the facts. Mistaken decisions are a predictable result.

The majority's treatment of El Paso's gas reserves is a case in point. The matter is of vital consequence to millions of gas consumers. The District Court's solution was acceptable to all parties, and the subject was not even mentioned in any brief or oral argument in this Court. Yet the Court has, on its own initiative, directed a changed allocation which threatens, not only to drive up the price of natural gas in California, but to weaken, rather than strengthen, the effect of any competition effort by New Company in the California market. (See pp. 19-22, *infra.*)

As a premise for its second ground for reversal—that the District Court failed to direct a "complete divestiture" —the majority states that "Neither appellants [sic] nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that could be made without complete divestiture." (Slip opinion p. 6) This state-

ment is wrong on the facts.* It also is wrong in its implication that any meaningful argument was had on this issue at all. No party had contended that the District Court's disposition was incomplete or a compromise. Utah's Jurisdictional Statement did not even mention the matter. No party could have inferred from this Court's order of April 21, 1969 that the matter was at issue.

The lack of any meaningful briefing on this point doubtless explains the Court's fundamental misconception of the decree below. And surely nothing else can explain its condemnation of the provision permitting New Company to assume—for no more than an instant of time—a portion of El Paso's debt. The propriety of this provision had never been questioned by anyone—for as we show (pp. 12-13, 16, *infra*), *it is designed to save New Company* (*and ultimately its customers*) *some $5,000,000 of interest expense a year.*

Notice to the parties that these matters were to be considered would have enabled them to bring the true facts to the Court's attention.

We respectfully submit that this Court cannot have intended to deny to litigants before it the right to be heard on this complicated matter. Nor can it have realized that it was passing upon the merits of the decision below before the substance and effect of that decision had been accurately presented to it.

Only a reconsideration after a proper hearing can remedy the error.

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* CIG, for example, commented in its memorandum dated April 24, 1969:

> "Moreover, the decree, if implemented, will sever El Paso completely from any hint of continuing control of or influence over the operations of the Northwest system." (p. 7)

We did not then develop the point (as we now do at page 8-13 *infra*), but only because, as far as we were aware, no one was then contending otherwise.

POINT II

The Court did not have before it the full decision of the District Court.

The Court should recall its opinion and order of June 16 because it did not have before it, when it acted, the full decision of the District Court. There was omitted from the record transmitted by the District Court Clerk in Salt Lake City a crucial and integral portion of the divestiture plan adopted below. It demonstrates that the District Court's plan *does* provide for complete divestiture and that the majority's pivotal finding to the contrary (slip opinion p. 4) is erroneous.

CIG is filing simultaneously with the present petition a motion under Rules 32 and 35 for leave to supplement the record. The motion seeks to make available a copy, certified by Judge Chilson, of the "Implementing Documents" which constitute the detailed provisions implementing the divestiture decree involved in this appeal.*

The Implementing Documents were negotiated in compliance with the District Court's order of June 21, 1968 (R. 2639; see also 291 F. Supp. at 32) and were filed and served on all parties in early August, 1968. Comments were had from all interested parties, which were the subject of a full hearing on August 23, 1968 (Tr. 9,952-11,048; see also R. 2741). As a result, the District Court ordered certain modifications which were reflected in amendments filed and served on October 1, 1968. The Implementing Documents as thus amended were approved by the District Court by

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* The Implementing Documents consist of a joint statement by CIG and El Paso counsel transmitting them to the District Court and the parties, a "Proposed Agreement" among CIG, El Paso, and New Company, various exhibits and schedules thereto, and six pages of "Restrictive Provisions". In the copy now being supplied to this Court, this material is consecutively paginated from 1 to 155; it is sometimes cited in this petition as "I.D. p. ".

order dated November 7, 1968, an order which also has been omitted from the record and is being supplied by CIG's motion under Rules 32 and 35.

The supposedly complete record docketed here (see this Court's Rule 12) when Utah filed its Jurisdictional Statement in late November, 1968 omitted, apparently by inadvertence, all of the 155 pages of the Implementing Documents except for a few pages of amendments (R. 2908), unintelligible standing alone.* Had these documents been before this Court during the deliberations leading to its Opinion and Order of June 16, the majority's fundamental misunderstanding as to the nature and effect of Judge Chilson's divestiture plan would have been avoided.

For example, the majority quite obviously believes that El Paso may be able at some later date to convert New Company's non-voting Preferred Stock into a substantial common stock interest in New Company. (Slip opinion p. 3) But, as the Implementing Documents make clear, not only is the Preferred Stock *never* convertible while held by El Paso, its officers, directors or significant stockholders (I.D. pp. 151-52)—*it is not convertible into stock of the New Company at all.* It is exchangeable only for common

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* CIG has had no prior occasion to call this omission to the attention of the Court. It became aware of the absence of the Implementing Documents last winter while drafting its motion to affirm in response to Utah's Jurisdictional Statement. CIG planned to submit with that motion a companion motion to make the Implementing Documents available to the Court. The copy of the Implementing Documents we presently are tendering was certified by Judge Chilson on February 19, 1969 with that earlier filing in view.

Before the motion could be made, Utah moved under this Court's Rule 60 to dismiss its appeal. Rule 60 normally operates automatically, and, in the wake of the Utah filing, the Clerk's office informed CIG counsel that no further filings were desired. When the Court later entered in this Docket its order of April 21 which set down Utah's Rule 60 motion for argument, nothing indicated that matters to which the Implementing Documents are pertinent were at issue.

stock of CIG (I.D. pp. 12, 83-99), a broadly owned company, the stock of which has been listed for many years on the New York Stock Exchange.

The majority opinion goes on to say that, "What the conversion ratio will be is not known * * *." (Slip opinion p. 3) The parties and the court below, however, knew it to be 0.35 shares of CIG Common Stock for each share of New Company Preferred, as specifically set forth in the Implementing Documents. (I.D. p. 12) This is more than a matter of mere detail, since it contributes directly to New Company's financial strength.

Moreover, the Court's knowledge of the circumstances under which the exchange privilege can be exercised was limited to the vaguest of hearsay: "*it is said*, there will be provisions to restrict El Paso control over the New Company." (Slip opinion p. 3 (emphasis supplied)) The Implementing Documents, however, make it plain that neither New Company nor CIG can ever come under the influence, let alone the control, of El Paso.

The Implementing Documents contain six pages of detailed "Restrictive Provisions" forming a part of the decision below (I.D. pp. 150-55), which we are reproducing, for the Court's convenience, as an Appendix to this Petition. They make clear that, upon the transfer of the Northwest system assets to New Company, El Paso's influence over those properties and the related business, will end—immediately, totally, and permanently.*

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* Moreover, pending the closing (which is to occur promptly upon receipt of the necessary appellate and regulatory approvals (I.D. p. 14)), CIG is entitled under the Implementing Documents to utilize the facilities of the Northwest system (I.D. pp. 45-51) to compete for the California market. As long ago as October, 1968, CIG entered into preliminary agreements with California distributors looking towards a new pipeline to that State. (See exhibit to CIG memorandum to this Court dated April 24, 1969.) CIG was actively negotiating with Canadian interests for a supply of gas to be transported from the Northwest Territories and delivered to New Company at the international frontier in the State of Idaho when this Court's decision of June 16 intervened.

The terms of the Preferred Stock, set forth in the Implementing Documents, are so designed that El Paso will be compelled, as a matter of economic necessity, to dispose of it as soon as possible, and El Paso has undertaken to do just that (Tr. 10,028). The Preferred Stock's initial 6% dividend rate is already below market rates; five years after issue it will drop to 5% (I.D. pp. 74-75). The true value of the stock can never be realized by El Paso except through its disposition to independent third parties who can, unlike El Paso, exercise the exchange privilege and become CIG stockholders. El Paso's temporary ownership of non-voting preferred stock is a financing device—of particular value to New Company, see pages 17-18, *infra*—and nothing more.

Thus the District Court did not ignore the teachings of *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 327-28 (1961). *Du Pont* did not require the instantaneous sale of the chemical company's vast holdings of General Motors stock. It recognized that reasonable mechanical flexibility was compatible with "complete divesture," provided that, there as here, the antitrust violator's instrument of control, a voting interest, was eliminated immediately and it was clear that it would be out of the picture entirely in a relatively short time (in *du Pont* ten years) (366 U.S. at 335).

In addition, the majority, without the Implementing Documents before it, could not be aware that it had seriously misapprehended the nature and effect of New Company's assumption of El Paso's debt. From the Implementing Documents it is clear that the debt assumption neither "helps keep the two companies in league" nor creates or perpetuates a financial connection between them.

El Paso's outstanding debt totals over $800,000,000 and at January 1, 1967 carried an average composite interest rate of 5.26% (El Paso Ex. 1, p. 11, Tr. 235). The Implementing Documents provide for the *complete transfer*

of $158,000,000 of El Paso's debt (the portion of El Paso's total debt ultimately determined to be properly applicable to the Northwest system) (I.D. pp. 11, 110) to New Company, **as follows: El Paso bonds and debentures in that** amount, drawn ratably from El Paso's various outstanding issues, will be delivered by their holders to New Company in return for the latter's own bonds and debentures having similar terms and conditions (except for a 1/8% increase in interest rates)—thus permitting the release of the Northwest system properties from the lien of El Paso's mortgage. The original El Paso securities will then be cancelled. (I.D. pp. 11, 16-17)

The debt assumption is simply a mechanical device to facilitate the closing of transfer of title to the properties; it is satisfied the moment it arises—*at the same closing*—by New Company's issuance of its own bonds and debentures directly to El Paso's creditors. New Company's connection with El Paso's debt thus arises and is severed in a scintilla of time. The process enables New Company to obtain its debt financing on terms comparable to those obtained by El Paso over a long span of years, during which interest rates were far more favorable than those prevailing today. It will save New Company an estimated $5,000,000 of annual interest costs.

Surely, the fact that New Company and El Paso initially will have the same group of creditors—primarily insurance companies and pension retirement funds, which traditionally hold substantial quantities of pipeline debt securities for investment—does not put the two companies "in league" (*cf.* slip opinion p. 7). Their respective debts will be distinct and separate, with no co-obligations, no overlapping security interests, no retained equities. New Company will no more be "in league" with El Paso than with any other debtor of similar creditors—than with, for example, a Boston real estate developer whose mortgages are held by the Metropolitan Life Insurance Company.

The Implementing Documents which spell out these arrangements have not before been available to this Court. The Court has in the past recalled its decisions for reconsideration where it has belatedly learned of significant gaps in the record which had been before it. See *Chicago and Vincennes R.R.* v. *Fosdick,* 106 U.S. 47, 80-82 (1882); *cf. Ambler* v. *Whipple,* 90 U.S. 278, 282 (1874).* It has done so because of the importance of having the true facts before ruling on the issues. It should do so again here.

POINT III

The District Court's divestiture plan serves the public interest; a cash sale will injure it.

As we have shown, the Court has clearly misunderstood the nature of the divestiture plan adopted by the District Court. It has also profoundly misconceived its purpose.

A cash sale was not avoided simply "to ease the pinch" on El Paso's private interest, as the majority suggests (slip opinion p. 7). Rather, the financial arrangements adopted were specifically designed to further and protect the public interest. Ironically—and surely unintentionally—the cash sale requirement substituted by this Court not only fails to promote those interests, but will frustrate them.

The Implementing Documents show that the fair value of the assets to be divested—established by arduous arm's

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* In other circumstances, the Court has historically been unwilling to decide matters when there is even a possibility that the record may be incomplete with respect to them. See, *e.g., Mishkin* v. *New York,* 383 U. S. 502, 512-13 (1966); *Halbert* v. *United States,* 283 U.S. 753, 764 (1930); *cf. Flournoy* v. *Wiener,* 321 U.S. 253 (1944).

length bargaining—is about $258,000,000.* The legitimacy of this figure has been disputed by no one.** Thus, **a final resolution of this case requires the complete divestiture of assets worth on the order of a quarter of a billion dollars.**

This is an enormous sum of money. To raise it (whatever the form of its payment to El Paso) inevitably will require financial arrangements of great complexity—arrangements which will determine New Company's financial strength and competitive potential for years to come.

The financial aspects of the divestiture decreed by the District Court were carefully formulated to insure that (1) New Company will have a capital structure comparable to the one the former Pacific Northwest Pipeline Corporation might be enjoying today if it had not been acquired by El Paso, (2) New Company can raise the vast sums of additional capital necessary for a new pipeline to California on terms at least as favorable as its competitors, (3) customers of the Northwest system will be protected against needless rate increases in the process, and (4) divestiture can be carried out promptly and certainly, free of the uncertainties and additional expense attendant upon fund

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* The calculations of the Implementing Documents and the figures cited from those Documents in this petition are as of April 30, 1968. Adjustments, based on formulae set out in the Implementing Documents, will be made at the closing to reflect changes in the plant of the Northwest system occurring after that date. (I.D. pp. 2, 10-12, 109-10)

** The only questions raised before this Court concerning the amount of the price to be paid to El Paso appear in the virtually identical texts set out at pages 24-25 of Mr. Bennett's final brief and at pages 8-9 of the *amicus* brief. Both sources assert, without citation to the record and in flat contradiction of the actual facts, that CIG agreed to pay $300,000,000, including an equity component of $130,000,000. This, they allege, is $30,000,000 too high and proof, as Mr. Bennett phrases it, that "crime does pay under the Clayton Act." Ironically, CIG's actual payment is to be *lower*, by almost $12,000,000, than the amount which Mr. Bennett and the *amicus* brief implicitly acknowledge would be reasonable.

raising in the prevailing state of the nation's financial markets.

None of these goals can be achieved by a cash sale of the properties.

The District Court was at pains to insure that the financial arrangements of the divestiture would not deprive New Company and its customers of the benefits of El Paso's presently favorable debt structure, which carries a composite average interest rate of 5.26%.*

This is accomplished under Judge Chilson's plan by the "assumption"—followed by an immediate novation in the manner previously described—of New Company's ratable share of El Paso's debt.

A cash sale, on the other hand, would have appalling consequences for New Company and, ultimately, the consumers it serves. To begin with, it is problematical whether, in the present period of active credit restraint, funds in such an amount could be raised at all. At best, divestiture may be delayed by the uncertainties of cash financing. But this question aside, it is virtually certain that, if borrowed, the funds would command an interest rate of at least 8½%.**

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* As of January 1, 1967. (El Paso Ex. 1, p. 11, Tr. 235) Since that date, this composite average interest rate is understood to have increased by approximately ¼ of 1%.

** The bank prime rate jumped in the late spring of this year to 8½%. CIG itself has since offered (on June 24) and sold $30,000,000 of first mortgage bonds priced to yield 8% (SEC Reg. No. 2-33117), and the Michigan Wisconsin Pipeline Company, a unit of the American Natural Gas Company system, has offered on June 30) $40,000,000 of first mortgage bonds priced to yield 8.125% (SEC Reg. No. 2-33216). Both issues were rated "A" by Moody's. *Prior* to the latest prime rate increase, Texas Eastern Transmission Corporation offered (on June 4) $50,000,000 of Ba-rated debentures priced to yield 8.55% (SEC Reg No. 2-32965). Underwriting and sales expenses result in a debt cost to the borrower of about .1 to .2 of one percent more than the yield to the public. To create market demand, debt issues of a new company operating the Northwest system—with untried management and no financial history—would undoubtedly require a higher interest than those of seasoned gas transmission companies.

This would mean to New Company, of course, interest costs of some $5,000,000 a year more than those payable if El Paso's debt is rolled over into debt of New Company in the manner specified by Judge Chilson. One need not follow through the intricacies of a rate-making proceeding to realize that, if New Company is not to go bankrupt, these increased interest costs must be recovered through increased rates charged the company's customers.

As for the equity portion of a New Company's capital, this, too, cannot be raised in today's markets on terms as favorable as those an independent Pacific Northwest Pipeline Corporation might have enjoyed at an earlier time. Investors no longer will accept high price-earnings ratios when purchasing utility common shares.*

The District Court's plan solves the problem in two ways. First, New Company's common equity will be furnished by CIG, principally in the form of about 1,750,000 shares of CIG's own common stock, which will be held as an

* A recent tabulation appearing in 83 *Public Utilities Fortnightly* No. 13, June 19, 1969 at page 102 indicates that the average price-earnings ratio on May 15, 1969 of the common stock of the 30 largest publicly owned pipeline and integrated system gas utility companies was only 13.6. Stock market price averages have broken sharply since that time. Another tabulation at page 99 of the same issue shows that sixteen electric utility preferred stock issues came to market in 1968. None was sold at a price producing a yield to the purchaser of less than 6.2%, and many yielded close to 7%. In the first few months of 1969, *before* the recent jump in the bank prime rate to 8½%, nine new issues of electric utility preferred stock were sold. None yielded less than 7%.

Every divestiture proposal presented to the District Court had to face the same problem of financing. *All* contemplated "assuming" the debt in some form or other, and most applicants for the divested property expected to buy only a small part of El Paso's equity interest, with the remainder going into an "insulated" voting trust. (See 291 F. Supp. at 9-13.) Non-voting preferred, with a declining dividend feature which will force its early disposal to third parties, accomplishes a complete divestiture far more surely than anything such applicants were interested in.

additional asset by New Company for at least five years, until the conversion rights of the New Company Preferred become operative. By reason of the accounting treatment involved, CIG can, in effect, supply New Company's common equity at a substantially lesser cost than would be required—by CIG or anyone else—on an equivalent amount of cash. Second, the non-voting Preferred Stock, yielding only 6% at issue and subsequently dropping to 5%, will give New Company the initial advantage of an additional layer of equity at most favorable terms. Moreover, upon its conversion into CIG common stock, the Preferred will have been retired by New Company without any cash outlay.

As a result, New Company's capital structure will be substantially strengthened, providing a more favorable foundation for the additional capital requirements of a California project and the foreseeable growth of the existing Northwest system than could be achieved under any alternative proposed below—or under the cash sale ordered by this Court. The favorable debt-to-equity ratio resulting from the District Court's divestiture plan will increase the amount of capital which New Company can raise through debt financing, improve the terms on which it can be obtained, and thereby enhance its ability to compete for a major project to California.

Compared to the measures adopted below, the consequences of the cash sale directed by this Court would be disastrous. The Court surely could not have intended to burden New Company with the weaker capital structure, the higher-cost debt, and the more expensive equity which will be the practical consequences of its recent opinion.

Nor could the Court have intended to subject New Company's customers to the threat of increased rates implicit in its decision. Yet a utility's earnings must provide both interest on its debt and a proper return on its equity in order to attract new capital; those earnings can only come from the rates charged the consumer.

The increased costs of capital flowing from a cash sale will inevitably be felt by natural gas consumers throughout the Pacific Northwest. Although the extent of the "pinch" on the gas consuming public cannot be exactly foretold, the threat is no small one. CIG estimates that a rate increase of over $11,000,000 a year may be necessary to cover the higher interest costs and higher equity costs which would be required were cash substituted for the consideration ordered by the District Court.

Under the District Court's plan New Company will begin life with a capital structure comparable to that of a mature gas transmission company. At its inception, New Company will enjoy, as was intended, the equivalent of the "financial history" the old Pacific Northwest Pipeline Corporation might have had today if it had not been acquired by El Paso. This Court's requirement that New Company's capital be raised in today's money market can only serve to handicap its ability to compete with established transmission companies — like El Paso — which have capital structures reflecting the cheaper money available in easier times.

Judge Chilson sought to protect the public interest. That interest requires a reconsideration of this Court's decision of June 16.

POINT IV

The District Court's allocation of gas reserves is not only consistent with, but is well designed to further, the purposes of the mandate.

The majority of this Court also found that the District Court's decree failed to "apportion gas reserves in a manner consistent with the purposes of the mandate." (Slip opinion p. 4) That purpose is, of course, "to restore competition in the California market." (Slip opinion p. 5.) The majority's criticism is plainly mistaken.

Mr. Justice Douglas's much quoted description of the nature of competition in the gas transmission business in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), makes the central point that:

> "* * * Once the [Federal Power] Commission grants authority to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, *a particular market is withdrawn from competition.*" (376 U.S. at 660) (Emphasis added.)

Just as the particular market segment is withdrawn from effective competition once service has been brought to it, with Commission approval, so, too, the related gas supply is no longer freely available for use in competing for new increments of demand.

It is undisputed in this record that the bedrock minimum requirements for an entirely new pipeline project to California are a daily market of 350,000 to 400,000 MCF and reserves of from three to five trillion cubic feet. (Tr. 2664-65, 3006) It likewise is undisputed that free reserves of this magnitude, uncommitted to the existing FPC-certificated services of El Paso's northwest and southern pipelines, simply do not exist anywhere in the El Paso system. (See Tr. 739, 751-52, 756, 2383, 3900-01.) Yet it seems clearly to be the Court's intention that in any new apportionment reserves be allocated to New Company "sufficient to meet the old Northwest's existing requirements and those of a California project", and that such additional reserves, beyond those awarded by Judge Chilson's decree, come primarily from the San Juan Basin. (Slip opinion p. 4)

None of the many parties below suggested that such an allocation was either feasible or desirable. No one before this Court even questioned the District Court's allocation of gas reserves. The reason is simply that Judge Chilson's solution of the reserve problem is, when ap-

praised in the light of the objective of creating new competition in California, the best that *can* be achieved within the realities of the natural gas industry.

In the face of the unyielding arithmetic of reserves and commitments—the requirements of the public interest—Judge Chilson decreed a division of El Paso's reserves which: (a) protected the existing customers of both the northwest and southern systems from the diversion of reserves earmarked for their use; and (b) required both El Paso and New Company to seek new reserves if they are "to be competitors for future increments to the California market." (291 F. Supp. at 20.)

Competition by a new pipeline to California should provide the consumers of that State with *more* gas to meet their steadily increasing demands, or *cheaper* gas, or both. Judge Chilson sought, by his division of reserves, to assure the delivery of additional gas while avoiding an increase in the delivered cost of supplies already earmarked for California.

To divert to New Company for use in its prospective California project gas reserves already committed to the needs of that State serves neither of these objectives. Such a diversion contributes nothing to California's overall supply. It simply reroutes, at predictably higher costs to the consumers, gas which they have had every reason to believe was already securely theirs.

Pipeline construction costs, like construction costs generally and interest costs, have been trending upward for many years. Amortization of capital charges is one of the major elements of cost involved in the delivery of natural gas. It makes little sense to divert gas, already earmarked for delivery to California in a pipeline long since built, to a new pipeline to California to be built at the much higher costs of the early 1970's. The delivered cost

of (and, therefore, the rates for) such diverted gas must climb.*

The "extra" San Juan Basin reserves which the majority feel Judge Chilson should have awarded to New Company would be a hindrance to New Company's fight for a meaningful place in the California market for another reason. Its competitive efforts and resources would, of necessity, have to be directed for years to come toward a new pipeline from San Juan to Southern California to utilize such reserves.

Whatever may have been the case a decade or more ago, there are, according to the consensus of qualified opinion, no significant unfound reserves in the San Juan Basin (Tr. 739, 751-52, 756, 2383, 2669, 3900-01). Even if New Company were to receive from El Paso reserves sufficient to put together a minimum project from San Juan, New Company would have to look elsewhere to find additional reserves to compete for increments of demand coming into existence thereafter. A first-priority project from other, potentially richer sources will yield far greater returns in terms of establishing New Company's long-range competitive potential, as well as assuring California of access to desperately needed sources of new gas supply.

Gas from a new source—Canada—was at the heart of the competitive threat which the former Pacific Northwest Pipeline Corporation posed to El Paso in the 1950's. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 654-55 (1964). It was access to a new source—Canada—from which California was barred by the illegal merger. It is a new source of gas which should be in the forefront of New Company's competitive plans.

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* Furthermore, to the extent that the diversion introduces now, or at some later date, an element of unused capacity in El Paso's southern system, the diversion must raise the unit delivered cost of the remaining gas, since the *same* fixed charges must be recovered from a lesser volume of deliveries. (See Tr. 739.)

On June 23rd of this year, Canadian interests (together with a firm of American engineering contractors) announced publicly plans for a new pipeline from the Fort Liard area of the Northwest Territories which initially will deliver 800,000 MCF/day to the international frontier in the State of Idaho. See *Wall Street Journal,* June 24, 1969, p. 5, col. 2 (Eastern edition). Prior to June 16 CIG was actively negotiating, on behalf of New Company, for gas for a California project from this source. (*Ibid.*) Any purchaser must be free to pursue such negotiations or it will have lost, in advance, a large part of its freedom of action.

The divestiture decree should not strip New Company's new management of the discretion needed to compete effectively. Judge Chilson's decree does not do so.

Conclusion

CIG asks by this petition and motion that the Court grant it and the other parties a hearing on the merits before finally deciding these complex matters, so important not only to the litigants but to the general public.

We ask that the Court permit the full record to be placed before it, so that it can consider the decision of the District Court in the light of the provisions of the Implementing Documents. These are a vital part of the decree not previously available to this Court.

We ask the Court to consider whether or not, through mistake, serious and unintended errors have been made in its decision of June 16, harmful to the general public as well as to private interests.

We do not believe that the final curtain should be lowered on this cause without such further consideration.

Respectfully submitted,

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July 11, 1969

Certificate of Counsel

I hereby certify, pursuant to Rule 58(1) of the Rules of the Supreme Court, that the foregoing Petition and Motion is presented in good faith and not for delay.

July 11, 1969

John F. Sonnett
Attorney for Petitioner,
Colorado Interstate Corporation

APPENDIX

Reproduced on the pages following is the text of the "Restrictive Provisions" constituting pages 150-55 of the "Implementing Documents" being presented to the Court by separate motion of Colorado Interstate Corporation under Rules 32 and 35. See pages 8-10 of the foregoing Petition.

[150]* Restrictive Provisions

El Paso and Colorado Interstate have agreed, subject to the approval of the Court, that the following restrictive provisions should be included in the Court's Final Order in this cause.

1. *Definitions*

a. The term "El Paso" shall mean El Paso Natural Gas Company, a Delaware corporation, or any successor.

b. The term "El Paso Affiliate" shall mean any Person directly or indirectly controlling, controlled by, or under common control with El Paso.

c. The term "Immediate Family" shall mean with reference to any individual person, the spouse, descendants, ascendants, brothers and sisters of such person.

d. The term "Person" shall mean any individual, partnership, association, joint-stock company, business trust, or organized group of persons, or other legal or business entity whether incorporated or not; or any receiver, trustee or other liquidating agent of any of the foregoing in his capacity as such.

e. The term "Holder of Record Only" shall mean, with reference to shares of stock of any corporation, any person who holds such shares solely of record as broker, pledgee, trustee, agent or otherwise in a representative capacity which carries no beneficial interest in such shares.

[151] f. The term "Northwest" shall mean Northwest Pipeline Corporation, a Delaware corporation, or any successor.[**]

* Each number appearing in brackets in this fashion indicates the start of the similarly numbered page in the certified copy of the "Implementing Documents" being filed for inclusion in the record.

** "Northwest" is the corporation generally identified as "New Company" in the papers filed in this Docket.

g. The term "Northwest Preferred Stock" shall mean the preferred stock of Northwest to be issued to El Paso in exchange (in part) for the assets to be divested by El Paso pursuant to the plan of divestiture ordered by the Court.

h. The term "Original Issue Date" shall mean the date on which the shares of the Northwest Preferred Stock shall first be issued.

i. The term "Colorado Interstate" shall mean Colorado Interstate Corporation (formerly Colorado Interstate Gas Company), a Delaware corporation, or any successor.

2. *Restrictions Against Exchange of Northwest Preferred Stock*

a. Neither El Paso nor any El Paso Affiliate may exchange any Northwest Preferred Stock for Colorado Interstate Common Stock.

b. The Northwest Preferred Stock may be redeemed (at the option of the holder thereof) by Northwest for Colorado Interstate Common Stock only upon presentation to Northwest or its agent of a certification by the holder thereof (or, in the event such holder is a Holder of Record Only, a certification by the beneficial owner thereof) to the effect that such holder (or beneficial owner):

(i) is not an officer or director of El Paso or of an El Paso Affiliate;

[152] (ii) does not beneficially own, control or hold with power to vote, directly or indirectly, in excess of one-half of one per cent. (½ of 1%) of the then issued and outstanding shares of the common stock of El Paso;

(iii) is not a member of the Immediate Family of any officer or director of El Paso or, to the best of the information, knowledge and belief of such holder, of any person who beneficially owns, controls or

holds with the power to vote, either directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then issued and outstanding common stock of El Paso;

(iv) is not acting for, or on behalf of any Person hereby precluded from redeeming Northwest Preferred Stock; and

(v) is not acting in concert, agreement or understanding with any other Person, but is acting in good faith solely in such holder's (or in such beneficial owner's) own behalf.

3. *Restrictions Against Acquisition of Northwest Common Stock and Colorado Interstate Common Stock*

No person who is an officer or director of El Paso or of an El Paso Affiliate, shall be permitted to purchase or retain any of the common stock of Northwest or to purchase or [153] retain more than one-tenth of one per cent (0.1%) of the then outstanding common stock of Colorado Interstate; nor for a period of ten years from the Original Issue Date shall any Person who, in the aggregate with members of his Immediate Family and with any Person with whom he is acting in concert, agreement or understanding and with any Person for whom or on whose behalf he is acting, beneficially owns, controls or holds with power to vote, either directly or indirectly, in excess of one-half of one per cent (½ of 1%) of the then outstanding common stock of El Paso, be permitted to purchase or retain any of the common stock of Northwest nor to purchase or retain more than five per cent (5%) of the then outstanding common stock of Colorado Interstate. The Attorney General of the United States shall have access to the stock transfer of books and records of El Paso, Northwest and Colorado Interstate for the purpose of enabling

him to enforce compliance with this provision. Nothing herein contained shall extend to any Holder of Record Only of stock of El Paso, Northwest or Colorado Interstate.

4. *Further Restrictions*

a. Except as contemplated in the plan of divestiture ordered by the Court, El Paso and its Affiliates are hereby enjoined from acquiring any capital stock or financial interest whatsoever in Colorado Interstate or in Northwest or any assets [154] of either, except such assets as might pass between El Paso and Colorado Interstate or between El Paso and Northwest in the ordinary course of their respective businesses.

b. For a period of ten years from the Original Issue Date, and except as contemplated by the plan of divestiture ordered by the Court, El Paso shall not acquire or hold after such acquisition, directly or indirectly, any of the outstanding common stock of Westcoast Transmission Company, Limited or any of the outstanding common stock of Northwest Production Corporation.

c. El Paso shall not have any person as an officer or director who is at the same time:

(i) an officer, director or employee of Northwest or Colorado Interstate;

(ii) the owner of any common stock of Northwest or more than one-tenth of one per cent (0.1%) of the outstanding common stock of Colorado Interstate or a person all members of the Immediate Family of which own in the aggregate more than one-tenth of one per cent (0.1%) of the common stock of Northwest or more than two-tenths of one per cent (0.2%) of the common stock of Colorado Interstate.

d. El Paso shall not employ, during a period of five (5) years from the Original Issue Date, any employee of Northwest without first obtaining the consent in writing of Northwest.

[155] e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (b) of paragraph 5 of the Certificate of Amendment of the Certificate of Incorporation of Northwest attached as exhibit to the Agreement dated , 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.

Amendment to Implementing Documents page 155

The cross-reference in paragraph "e", quoted immediately above, is to the inapposite material appearing at I.D. pp. 65-66. A revision of I.D. p. 155 was included in the amendments to the Implementing Documents which El Paso and CIG filed with the District Court and served on the parties on or about October 1, 1968. (See R. 2908.) The revised page 155 which Judge Chilson approved, along with the remainder of the Implementing Documents, by order dated November 7, 1968 reads as follows:

[155] e. El Paso, its Affiliates, officers and directors are hereby enjoined from exercising the voting rights accorded the holders of the Northwest Preferred Stock as set forth in subparagraph (a) of paragraph 9 of the Certificate of Designation of Northwest attached as Exhibit III to the Agreement dated , 1968, between El Paso, Colorado Interstate and Northwest on file in this cause, should such voting rights arise while such stock is held by them.[*]

f. Neither El Paso nor any of its Affiliates, officers or directors shall, while holding any shares of Northwest Preferred Stock, unreasonably or arbitrarily refuse to cast an affirmative vote for, or to consent to, any action proposed

* The cross-reference is to the material appearing at I.D. pp. 102-04.

to be taken by Northwest and requiring the affirmative vote or consent of all or any portion of the holders of Northwest Preferred Stock, including without limitation any action referred to in Paragraph 5 of Article II of the Certificate of Amendment of the Certificate of Incorporation of Northwest, attached as Exhibit II to the Agreement dated , 1968 between El Paso, Colorado Interstate and Northwest on file in this cause [*], or in Paragraph 7 or 8 or subparagraphs (b) or (c) of Paragraph 9 of the Certificate of Designation of Northwest, attached as Exhibit III to said Agreement [**]. In the event of any such refusal, Northwest may apply to this Court for such relief, as may be appropriate under the circumstances.

* The cross-reference is to the material appearing at I.D. pp. 64,67.

** The cross reference is to the material appearing at I.D. pp. 99-101 and 105-06.